Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MARK WIENER,

Petitioner,

v.

LAWRENCE-PICASO, INC.,
LAWRENCE PICASO, INC. d/b/a
LAWRENCE PROPERTIES and
LAWRENCE PROPERTIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT, STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the due process guaranteed by the Fourteenth Amendment violated where a state court grants a right to jury trial but then overturns the verdict in gross violation of the state's standards for review of a jury verdict, thereby depriving the party in whose favor the verdict was rendered of a valuable property interest, without due process of law?

2. Is the last clause of the Seventh Amendment, which prohibits reexamination of jury verdicts except as permitted under the rules of the common law, applicable to cases tried in the state courts, as held by this Court in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897)?

3. Is the due process and equal protection of the laws guaranteed by the Fourteenth Amendment violated when a state in a case where only damages have been appealed, with no cross appeal filed by the defendant, without any notice, and in severe violation of the state's procedural requirements, overturns the jury's verdict on liability?

4. Is the due process and equal protection of the laws guaranteed by the Fourteenth Amendment violated where a contract requires automatic renewal and the state courts chose to ignore and violate that provision of the contract?

5. Is the due process and equal protection of the laws guaranteed by the Fourteenth Amendment violated when a state court in a civil case falsely accuses the plaintiff of forgery of which he is totally innocent by legal definition?

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Petitioner respectfully petitions for a writ of certiorari to review the final judgment of the Supreme Court of the State of New York, affirmed by the Appellate Division of the Supreme Court of the State of New York, as to which the New York Court of Appeals, the highest court of New York State, denied leave to appeal.

OPINIONS BELOW

The opinion of the Appellate Division of the New York State Supreme Court affirming the final judgment is published at 295 A.D.2d 273, 744 N.Y.S.2d 392 and is attached as Appendix A.

The opinions and orders of the trial judge setting aside a portion of the jury verdict are unpublished and are attached as Appendices D and E.

The order of the New York State Appellate Division denying reargument and leave to appeal is unpublished and is attached as Appendix F.

The order of the New York State Court of Appeals denying leave to appeal is published at 99 N.Y.2d 504, __ N.Y.S.2d __, __ N.E.2d __, and is attached as Exhibit G.

The final judgment of the Supreme Court of the State of New York, County of New York, is unpublished and is attached as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Appellate Division of the New York State Supreme Court denying petitioner's appeal was entered on June 27, 2002. The order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal was entered on December 17, 2002 and is set forth in Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

A. ***United States Constitution, Seventh Amendment***

Trial by jury in civil cases.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

B. ***United States Constitution, Fourteenth Amendment, Section 1***

> [N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Mark Wiener ("Employee") was hired by respondents pursuant to a written employment agreement ("the Agreement") of August 1997 as a property manager. Respondents ("Employer") are in the business of managing real estate. Simultaneously with his employment, Employee caused owners of certain valuable properties ("the Ackerman Properties") to transfer management and leasing of those properties to Employer (PA89-90, PA100-101, PA108-111, PA116-117, and PA427-429).[1] Thus, this was not simply an Employer-Employee arrangement; it involved from inception the transfer of assets to Employer (the Ackerman Properties) as an inherent part of the transaction.

The Agreement provided that Employee's employment would continue for a "minimum of three years . . . and thereafter shall automatically renew on a year to year basis". It was further agreed that Employer could terminate the agreement at any time on 14 days prior written notice in the event of Employee's "willful non-performance or malfeasance" or if the Ackerman Properties were no longer managed by Employer (PA428 and Appendix H, p. 25a).

Employee sued for breach of contract and produced at trial expert testimony that in all likelihood the Ackerman Properties would remain with Employer for about ten to twenty years. Employer did not produce at trial any expert testimony of its own to refute this. Employer alleged that its

---

1. "PA" refers to Employee's (Petitioner's) Appendix filed with the Appellate Division of the New York State Supreme Court, First Department. "RA" refers to Employer's (Respondents') Appendix filed with such court.

firing was justified and that it owed nothing, claiming that Employee was guilty of willful non-performance and malfeasance (PA220 and PA359-362).

A. There Was Sharply Conflicting Trial Testimony on Employer's Defenses. The Jury Resolved The Critical Issue of Credibility, Believing Employee and Not Employer's Witnesses

The case was tried before a jury in the state courts of New York (Supreme Court of the State of New York, County of New York) over eight days during December 2000. Most of the trial was consumed by Employer's attempt to show Employee malfeasance or willful non-performance and by detailed Employee evidence and testimony contradicting each and every particular of Employer's alleged evidence (PA14, PA20, and PA361).

The case was submitted to the jury under instructions that it was to award nothing to Employee if it found him guilty of malfeasance or willful non-performance but that if it did not, that Employer would have breached the contract and the jury was to award damages to compensate for the breach (PA361-362).

The jury totally rejected Employer's claims of malfeasance and willful non-performance, finding that Employee was "ready, willing and able" to do his job and found Employer had breached the Agreement when it fired Employee (PA16-17). The jury awarded Employee $205,000 in damages which it explained in a note was 4.5 years at $50,000 per year ($225,000) (Employee's salary including benefits), less unemployment benefits of $20,000 (Appendix D and PA16-19).

In his September 10, 2001 decision on Employer's post-trial motion the trial judge held:

> At Trial, conflicting evidence was presented regarding the acts of the plaintiff, with the issue being the credibility of each side's witnesses.
>
> * * *
>
> In this case, the jury verdict finding a breach of the employment contract is amply supported by the credible evidence.

Appendix E, pp. 17a-18a and PA14.

The trial judge thus held that there was "conflicting evidence . . . regarding" Employer's claims of malfeasance and willful non-performance and that the decisive issue was the "credibility of each side's witnesses". Correctly, in this part of his opinion, the trial judge sustained the jury verdict which totally rejected Employer's claims of malfeasance and willful non-performance.

B. The Trial Judge Unlawfully and Flagrantly Disregarded The Automatic Renewal Provisions of the Written Contract

The trial judge, however, refused to permit an award of damages beyond the end of the minimum three year period. Thus, he set aside the jury's verdict to the extent it awarded damages during the period of automatic renewal, holding:

> While there was ample credible evidence of a breach, there was a lack of credible evidence

> regarding the probability of renewal of the subject employment contract.

Appendix E, p. 18a and PA14.

Since the renewal was automatic (PA428), no evidence could possibly be needed to show "the probability of renewal". Without justification of any kind and giving no reason, the trial judge read the automatic renewal clause out of the contract and unlawfully reduced the damages from $205,000 to $34,266.67, plus interest (Appendices D and E and PA11-15).

C. The Appellate Division Violated New York Law and Employee's Rights to Due Process and Equal Protection When It Considered Liability Issues Which Had Not Been Appealed

An appeal was taken by Employee to the Appellate Division of the New York State Supreme Court appealing only from the reduction of the damages awarded by the jury from $205,000 to $34,266.67. There was no cross-appeal by the Employer (PA3-5).

Under New York law in such a situation the appellate court's jurisdiction is limited to the damages issue appealed and it may not consider liability issues, since only the reduction in damages was appealed [e.g., *Vias v. Rohan*, 119 A.D.2d 672, 501 N.Y.S.2d 109 (2d Dep't 1986); ***4 New York Jurisprudence 2d, Appellate Review § 149***, p. 195; *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132, 504 N.Y.S.2d 519 (2d Dep't 1986) and *City of Mount Vernon v. Mount Vernon Housing Authority*, 235 A.D.2d 516, 652 N.Y.S.2d 771, 772 (2d Dep't 1997)]. Employee did not receive equal protection

of the laws since this binding principle of New York law was not applied in his case.

In violation of this principle, and without any notice to Employee, the New York State Appellate Division overturned the jury's verdict on liability, finding against the Employee on both malfeasance and willful non-performance, neither of which was before it (Appendix A).

The New York State Appellate Division violated Employee's right to due process when it overturned the jury's verdict on these issues in blatant violation of hallowed common law principles that a jury's verdict cannot be overturned where the matter depends on resolution of disputed issues of credibility.

The crucial holding of the New York State Appellate Division was an outrageous, unlawful directed verdict that Employee had committed forgery and had totally failed to visit the buildings he was managing which, in egregious error the New York State Appellate Division held "constituted wilful non-performance and malfeasance" as a matter of law (Appendix A, p. 3a).

D. The Appellate Division In Severe Error, Unlawfully and Falsely Directed A Verdict On Alleged "Forgery" Where The Evidence Was Clear There Was No Forgery Committed. Thereby It Nullified Employee's Constitutional Right to The Rendered Jury Verdict

The New York State Appellate Division's taking of the issue of supposed forgery from the jury sets an extremely dangerous precedent severely abridging the constitutional right that a jury verdict may be reviewed only as permitted

under the rules of the common law. The New York court unlawfully imposed its own personal and biased view rather than permitting the jury verdict to stand as is constitutionally required. The New York State Appellate Division falsely and in flagrant error accused Wiener of committing forgery, which Wiener never did.

The New York State Appellate Division's direction of a verdict on forgery is necessarily a direction of a verdict on the crucial element of intention to defraud [e.g. ***New York Penal Law, § 170.05***]. That holding of the New York State Appellate Division totally violates Employee's right to the jury verdict on that issue which found him totally innocent of all charges.

The evidence on the "forgery" question in the Record was the following:

A. Employee as managing agent filed two (2) New York City required multiple dwelling registration forms on behalf of persons who were in fact the owners. The owners were not available at the time and these required forms needed to be promptly filed. There was no cheating or defrauding of the owners since Employee did exactly what they wanted, registering their buildings in an accurate and timely manner (RA28-RA30, RA165, and RA281).

B. Employee signed without simulating the owner's signature in any manner or form (RA31-RA32 and RA280). He signed in his own handwriting since he was the owner's agent (*ibid.*). In light of this undisputed evidence, the trial judge would not "allow the use of the term forgery in this case" (RA171). He held that Employer had "not even come close to proving forgery" (RA173).

C. Employee received no profit or benefit of any kind. There was no money or any other economic benefit of any kind which he received (RA33 and RA281). This key and critical element of forgery was totally absent here.

D. Employee testified that he would have asked the owners to sign if they were available, but they were not, and on behalf of the owners, he wanted to get these required forms promptly filed (RA29-RA30 and RA249).

Employee's testimony totally contradicted any fraudulent or deceitful intent. Since it was established that no gain could have been obtained by Employee as a result of the signing of these documents, and that the owners had no choice but to sign these forms as a required formality, forgery was not a credible issue; therefore, the jury ruled there was no forgery committed and it considered Employee to be a credible witness. In violation of the Constitution, the New York State Appellate Division held that it would decide on credibility, not the jury, and it thereby jeopardizes every U.S. citizen's right to trial by jury.

During Employee's period of employment Employer was fully aware of the signing of these forms which it then regarded as totally innocuous, giving no notification of any kind to Employee (RA637). Therefore, for the New York State Appellate Division to direct a verdict on this was ludicrous and unconstitutional.

E. The New York Appellate Division Unconstitutionally Disregarded The Buildings Visitation Evidence Supplied By The Employee and Acknowledged By The Employer and Resolved Issues of Credibility Which Were The Sole Province of the Jury

Employee repeatedly testified at trial that he complied with his responsibilities and visited all buildings he was managing whenever it was necessary (RA174, RA178 and RA180, emphasis added). Some buildings he had to visit "more than once a week", others less "depending upon the necessity" (RA175). He testified he stayed at a building when he visited it "about an hour" (*ibid.*). As shown by defendants' attorney's concession, Employee made a minimum of 120 visits to his buildings during his term of employment (PA303 and RA805-RA816).

Employee's testimony was that his superiors never set a "minimum standard", the number of minimum required visits (RA81 and RA176-RA177). Employee's officers testified to the contrary, creating an issue of who was lying (RA313 and RA521-RA522). The jury was very concerned with this conflict and who was lying. During its deliberations the jury gave the trial judge a note stating insofar as relevant:

> Was Mark [Employee] told in writing of job responsibilities to visit weekly?

PA402. The answer given by the lower court was "No" (PA402). There was no exception.

Employee never was told his visits to the buildings were not sufficient (RA190).

The jury which carefully reviewed the evidence had its verdict overturned by the New York State Appellate Division which was imposing its own distorted and unconstitutional views of who to believe. The trial judge correctly ruled the issue "was the credibility of each side's witnesses" (Appendix E, p. 17a).

F. It Was For The Jury To Determine Whether There Was Wilful Non-Performance And Malfeasance By Employee Especially In Light of Employer's Admitted Failure To Give Any Written Notice As Mandated By Paragraph 6 of The Contract

The Agreement provided in paragraph 6 that if Employee's performance "fails to satisfy reasonable standards" he was to be given:

> . . . written notice setting forth the areas where Employee has failed to perform adequately and shall provide Employee with a three month period to correct such deficiencies.

PA428 and Exhibit H.

Employer admitted no written notice was given here (RA688-RA689), which was confirmed by Employee (PA153). Since there was no written notice, there was no wilful nonperformance.

The clear purpose of this contract provision was to require that alleged defects be set forth in writing during the term of employment, with an opportunity to cure, rather than to have *ex post facto* creation of never previously mentioned

complaints, after the employee was fired. As Employee's attorney argued in summation:

> [H]e was supposed to get notice if he wasn't performing. No one can read paragraph 6 and say Mark Wiener wasn't supposed to get written notice that he wasn't performing.

PA333.

G. Employee Duly Raised In The State Courts His Constitutional Claims

Given the absence of notice to Employee before the New York State Appellate Division rendered its opinion that it was going to violate his constitutional rights in its opinion, the first opportunity Employee had to assert these outrageous due process, equal protection and Seventh Amendment violations was in his motion to the New York State Appellate Division for reargument or, in the alternative, leave to appeal to the New York State Court of Appeals. In that Notice of Motion dated July 22, 2002, Employee stated that the New York State Appellate Division Opinion of June 27, 2002:

> severely denies and abridges the constitutional right to jury trial.

Notice of Motion, p. 2.

It was further stated in that Notice of Motion that such Opinion:

> permits, in flagrant violation of . . . constitutional due process, an appeal of liability issues where

> the only issues appealed were damages, with no notice being given to plaintiff that liability issues were to be considered.

Notice of Motion, p. 2.

In the affirmation in support of such motion it was stated:

> This Court's [the Appellate Division's] Opinion and Order of June 27, 2002 severely infringes the right to jury trial expounded by the Court of Appeals [of New York State].

Affirmation, p. 12.

> This Court [the Appellate Division] violated the law of this State when it denied the plaintiff [Employee] his constitutional right to trial by jury by nullifying the jury verdict which found in favor of the plaintiff.

Affirmation, p. 1.

Such affirmation further stated that the New York State Appellate Division's "consideration of . . . liability issues without notice to [Employee] was a violation of procedural due process" (Affirmation, p. 10).

Such affirmation further stated:

> Defendant withdrew its cross appeal [PA5]. Thus, none of the issues of liability were properly before this Court [the Appellate Division]. . . .

> There was a patent violation of procedural due process. . . .
>
> [W]ithout any notice to [Employee] or his counsel, this Court [the Appellate Division] chose to bottom its Opinion on liability issues. . . .
>
> This was a patent violation of procedural due process.

Affirmation, p. 11.

In his motion for leave to appeal to the New York Court of Appeals Employee stated:

> The constitutional right to jury trial has been unlawfully eviscerated.

Notice of Motion to Court of Appeals, dated 11/1/02, p. 2.

> The Appellate Division in its Opinion of June 27, 2002 . . . violated . . . the constitutional right to jury trial when it chose to take these issues of credibility from the jury and decide them itself by directing a verdict against plaintiff on the critical factual issues.

Motion to Court of Appeals for leave to appeal, p. 4.

> [The Appellate Division] . . . took away from [Employee] his constitutionally granted right to a rendered jury verdict.

Id., p. 14.

> There was no cross appeal by [Employer]. Thus, none of the issues of liability were properly before the Appellate Division. . . .
>
> There was a patent violation of procedural due process. [Employee's] Notice of Appeal was limited to the reduction in damages from $205,000 to $34,266.67. . . .
>
> Nonetheless, without any notice to [Employee] or his counsel, the Appellate Division chose to bottom its Opinion on liability issues. . . .
>
> This was a patent violation of procedural due process.

Id., pp. 17-18.

REASONS FOR GRANTING THE WRIT

A. The New York State Appellate Division Violated Employee's Constitutional Rights to Due Process, Equal Protection of the Laws, and Under the Seventh Amendment, Last Clause

The New York State Appellate Division took from Employee his proprietary right to the rendered jury verdict of $205,000, without due process of law.

It equally violated the rules of the common law incorporated in the Seventh Amendment, second clause when it overturned the jury's verdict that there was no malfeasance or willful non-performance.

In *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), this Court held:

> It is clear that the last clause of the seventh amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state.

166 U.S. at 242-243.

The last clause of the Seventh Amendment provides:

> [N]o fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

In the case at bar, the New York State Appellate Division devastated "the rules of the common law" when it reversed the jury verdict on the issue of credibility, as to witnesses only the jury had seen and heard.

New York State deprived Employee of his constitutional rights when it took from him by illegal violations of its own procedures the benefit of a $205,000 jury verdict.

B. Employee Had A Property Interest In The Rendered Jury Verdict Which Was Taken From Him Without Notice and Illegally in Violation of Due Process and Equal Protection

It has been recognized by this Court that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause". *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 428 (1982) citing *Mullane* v, *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). It is likewise well-established that "[w]herever one is assailed in his person or his property, there he may defend [citations omitted]." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

Indeed, in *Logan*, this Court recognized that it has "traditionally held that the Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or plaintiffs attempting to redress grievances." 455 U.S. at 459. Thus, "[s]imilarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures when such an action would be the 'equivalent of denying them an opportunity to be heard upon their claimed right(s).' " *Id.* at 429-430, quoting, *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

Thus, in *Logan*, this Court held that an employee's right to use the Illinois Fair Employment Practices Act's adjudicatory procedures was a species of property protected by the due process clause and that the employee was entitled to have the Commission consider the merits of his charge.

See also New York State National Organization for Women v. Pataki, 261 F.3d 156 (2d Cir. 2001), which held that "the Fourteenth Amendment guarantee of due process is fully applicable to adjudicative proceedings conducted by state and local government administrative agencies", 261 F.2d at 163 and that "[t]here is no dispute that a legal cause of action constitutes a 'species of property protected by the Fourteenth Amendment's Due Process Clause.' [Citations omitted.]" 261 F.3d at 163. The New York State Appellate Division, First Department, itself has found that the "right to utilize adjudicatory procedures established by state law constitutes a property interest", *In the Matter of the Application of Deas v. Levitt*, 139 A.D.2d 1, 6, 530 N.Y.S.2d 807, 810 (1st Dep't 1988) relying on *Logan*, 455, U.S. 422.

This Court has expressed concern for whether a

> plaintiff has been accorded due process in the primary sense, . . . whether it has had an opportunity to present its case and be heard in support . . .[W]hile it is for the state courts to determine the adjective as well as substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Richards v. Jefferson County, Alabama, 517 U.S. 793, 804 (1996), quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-682 (1930).

As has been recognized, "[a] fundamental requirement of due process is 'the opportunity to be heard.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Here, where Employee was not heard before the New York State Appellate Division on the liability issues, including the alleged forgeries, this effectively deprived Employee of his opportunity to be heard.

In the instant case, the jury found, after seeing and hearing the witnesses and deciding who was telling the truth and who was lying, that the Employee was entitled to recover from the Employer the sum of $205,000. Without hearing any evidence (and thus, preventing any adjudicatory procedure), the New York State Appellate Division held that the Employee had committed forgery and had not visited the properties he was managing, despite the fact that these issues were not even before the Court and could be decided only based on credibility of witnesses. Having received no notice from the New York State Appellate Division, this Employee had no opportunity to defend against these charges at the Appellate Court level. Thus, the New York State Appellate Division deprived Employee of due process and equal protection of the laws by depriving him of any adjudicatory procedure on the liability issues, including the serious matter of alleged forgery.

Like a cause of action, a jury verdict in its favor should be viewed as a property right of the litigant, of which it should not be deprived without due process of law.

C. The Petition Should Be Granted

To take from Employee a $205,000 jury verdict, where the only issues were jury issues of credibility, is to deny Employee due process of law as well as to violate the last clause of the Seventh Amendment since this jury verdict was overturned without notice totally in violation of the "rules of the common law".

To permit the New York State Appellate Division to find the Employee guilty of forgery when this issue was not before it and to further allow it to do so without offering Employee any opportunity to adjudicate this issue violates due process.

Due process requires that a state adhere to its own basic procedural rules in reviewing and revising jury verdicts. This case presents an excellent opportunity for this Court to review and vindicate that principle.

Granting certiorari in this case will benefit American jurisprudence so that the due process clause becomes an effective limit on abusive power of state appellate courts in civil cases.

Moreover, the second clause of the Seventh Amendment should be given the role envisioned by this Court in *Chicago, B. & Q. Co. v. Chicago*, *supra*, so there is a constitutional remedy for the unlawful and outrageous revision of jury verdicts in violation of the rules of the common law.

CONCLUSION

The Supreme Court must grant certiorari. This case presents an extremely important opportunity for this Court to vindicate the right to jury trial in this country so that rendered jury verdicts are not abusively and unlawfully set aside by state appellate courts, in violation of due process, equal protection of the laws and the last clause of the Seventh Amendment.

Every United States citizen's right to trial by jury is in severe jeopardy if the travesty of justice exhibited in this case is not remedied by the United States Supreme Court.

Respectfully submitted,

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APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT DATED JUNE 27, 2002

SUPREME COURT
APPELLATE DIVISION
FIRST DEPARTMENT, NEW YORK

Mark Wiener,

Plaintiff-Appellant,

-against-

Lawrence-Picaso, Inc., et al.,

Defendants-Respondents.

Williams, P.J., Saxe, Sullivan, Friedman, JJ.

Melvin S. Hirshowitz

Mark J. Alonzo

Order and judgment (one paper), Supreme Court, New York County (Norman Ryp, J.), entered February 5, 2002, which, after a jury trial and upon the partial grant of defendants' motions to set aside the verdict, awarded plaintiff in this action for breach of an employment contract the total sum of $43,780.67, unanimously affirmed, without costs.

Plaintiff's family owned several properties in the Bronx and Manhattan ("Ackerman Properties"). In August 1997,

Appendix A

Ackerman Properties agreed to hire defendants to manage their interests. At the same time, on August 26, 1997, plaintiff, a property manager, entered into an employment agreement with defendants for an initial three-year term with a provision for automatic renewal on a year-to-year basis. The agreement also provided, in relevant part, that it could be terminated by defendants in the event that plaintiff's actions constituted wilful non-performance or malfeasance or if Ackerman Properties was no longer managed by defendants. Twenty-three months after entering into the agreement with plaintiff, defendants terminated his employment.

Following a trial, the jury returned a verdict awarding plaintiff $205,000. The jury concluded that defendants breached the employment agreement and that based on the agreement's automatic renewal provision, plaintiff would have remained employed at defendants for an additional 3½ years after the initial term expired. Thereafter, the trial court granted defendants' post-trial motions to the extent of reducing the award of damages to the extent indicated above.

The trial court's finding, that the plaintiff should only be compensated for the remainder of the initial three-year term of the employment agreement less the unemployment benefits he received (*see*, *Cornell v. T.V. Dev. Corp.*, 17 N.Y.2d 69, 74), was warranted as a matter of law since there was "no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury" that plaintiff would have remained employed by defendant beyond expiration of the initial non-terminable contract term (*see*, *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499). The trial was replete with

testimony demonstrating that plaintiff's actions, while in the defendants' employ, including failing to visit the buildings which he managed and forging the signatures of property owners on New York City Multiple Dwelling Registration Forms, constituted wilful non-performance and malfeasance, and as such, justified nonrenewal of the employment agreement.

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 27, 2002

s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX B — ORDER AND JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED JANUARY 18, 2002 AND FILED FEBRUARY 5, 2002

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 603935/99

At IAS Term, Part 44, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, New York, New York, on the 18th day of January, 2002.

PRESENT:
Hon. NORMAN C. RYP, Justice.

MARK WIENER,

Plaintiff,

-against-

LAWRENCE-PICASO, INC., LAWRENCE PICASO, INC. d/b/a LAWRENCE PROPERTIES and LAWRENCE PROPERTIES,

Defendants.

Appendix B

ORDER AND JUDGMENT

The issues in the above-entitled action having duly come on for trial before Justice Norman C. Ryp, and a jury, at an IAS Term, Part 44 of this Court, held at the Courthouse, located at 71 Thomas Street, in New York County, and the plaintiff having appeared by his then attorney Robert D. Kraus, and the defendants having appeared by their attorney, Alonso, Ferrigno & Andalkar, P.C., the issues having been duly tried, and the jury having rendered a verdict on December 21, 2000 , in favor of the plaintiff and against the defendants in the sum of $205,000;

Defendants having moved by Notice of Motion dated April 9, 2001 to grant defendants a directed verdict, or for judgment notwithstanding the verdict, and for other relief;

Upon the affirmation of Mark J. Alonso, dated April 9, 2001, and the affidavit of Howard Kitain, sworn to April 9, 2001 and the exhibits attached thereto, in support of the motion;

Plaintiff having thereupon cross-moved by Notice of Cross-Motion dated June 11, 2001 for the award of prejudgment interest and other relief;

Upon the affirmation of Robert D. Kraus, dated June 11, 2001 and the exhibits attached thereto in support of the cross-motion and in opposition to the motion;

Appendix B

Upon the affirmation of Manoj R. Andalkar, dated July 6, 2001, and the exhibit attached thereto, in opposition to the cross-motion and in further support of the motion;

Upon the Decision and Order of Justice Norman C. Ryp, dated September 10, 2001 (copy attached as Exhibit A) partially granting and partially denying the motion and cross-motion and directing the settlement of an Order and Judgment;

Defendants having thereupon moved by Order to Show Cause issued on October 5, 2001 requesting leave to reargue and requesting further modification of the Court's September 10, 2001 Decision and Order;

Upon the two affirmations of Mark J. Alonso, dated respectively October 2, 2001 and October 4, 2001 and the exhibits attached thereto, in support of the Order to Show Cause;

Plaintiff having thereupon cross-moved by Notice of Cross-Motion dated October 18, 2001 to renew and reargue with respect to the aforesaid September 10, 2001 Decision and Order;

Upon the affirmation of Robert D. Kraus, dated October 18, 2001, and the exhibits attached in support of the cross-motion;

Upon the affirmation of Mark J. Alonso, dated October 22, 2001 in opposition to the cross-motion and in further support of the motion; and

Appendix B

Upon the Decision and Order of Justice Norman C. Ryp, dated November 14, 2001 (copy attached as Exhibit B) denying plaintiff's cross-motion to reargue and granting defendants' motion to reargue as set forth in such Decision and Order and directing settlement of an Order and Judgment;

Now, on motion of MELVIN S. HIRSHOWITZ, attorney for the plaintiff, it is

ORDERED, that leave to reargue is hereby granted to defendants, and upon the aforesaid papers and upon such reargument, defendants' motion to set aside the jury verdict is granted only to the extent that judgment is to be entered for plaintiff in the reduced sum of $34,266.67, plus interest from July 29, 1999 through December 21, 2000, the date of the jury verdict, plus interest from December 22, 2000 to the date of entry of judgment, together with the costs and disbursements of this action; and it is further

ORDERED, that plaintiff's cross-motion for leave to reargue is hereby denied; and it is further

ORDERED, that this Court's Order dated September 10, 2001 is hereby vacated and set aside to the extent inconsistent with the above; and it is further

ADJUDGED, that plaintiff MARK WEINER, residing at 25 Central Park West, New York, New York 10023 does recover of the defendants LAWRENCE-PICASO, INC., LAWRENCE PICASO, INC. d/b/a LAWRENCE PROPERTIES and LAWRENCE PROPERTIES located at 855 Avenue of the Americas, New York, New York 10001, jointly and

severally, the sum of THIRTY-FOUR THOUSAND TWO HUNDRED SIXTY-SIX AND 67/100 ($34,266.67) DOLLARS, plus interest thereon from July 29, 1999 through December 21, 2000 in the sum of $4,309.15, plus interest from December 22, 2000 through the date of entry of judgment to be taxed by the judgment in the sum of $3899.85, together with costs and disbursements in the sum of $1305.00, making in all the total sum of $43,780.67, and that the plaintiff MARK WIENER have execution therefor.

1/18/02 ENTER,

s/ Norman C. Ryp
NORMAN C. RYP
J.S.C.

s/ [illegible]
CLERK

APPENDIX C — JURY VERDICT WITH JURY INTERROGATORIES DATED DECEMBER 21, 2000

JURY INTERROGATORIES (COURT EXHIBIT I) REFLECTING JURY VERDICT, DATED DECEMBER 21, 2000, AND COURT EXTRACT CERTIFYING JURY VERDICT

INDEX NO. 603935/99

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 44

MARK WIENER,

Plaintiff,

-against-

LAWRENCE-PICASO, INC., LAWRENCE PICASO, INC. d/b/a LAWRENCE PROPERTIES, and LAWRENCE PROPERTIES,

Defendants.

RYP, NORMAN C., J.:

JURY INTERROGATORIES

NOTE: At least five (5) jurors must agree on the answer to each and every Question below; although they do not have to be the same five (5) jurors for each Question.

Appendix C

1. Whether or not plaintiff, MARK WIENER, was ready, willing and able to perform his employment contract dated August 26, 1997, with defendants, LAWRENCE-PICASO, INC., LAWRENCE-PICASO INC. d/b/a LAWRENCE PROPERTIES, and LAWRENCE PROPERTIES, until his termination on July 29, 1999?

✓	
YES	NO

If you answered YES to Question 1 above, proceed to Question 2 below. If you answered NO to Question 1 above, proceed to Question 4 below.

2. Whether or not defendants, LAWRENCE-PICASO, INC., LAWRENCE-PICASO, INC. d/b/a LAWRENCE PROPERTIES, and LAWRENCE PROPERTIES, breached its employment contract with plaintiff MARK WIENER, dated August 26, 1997?

✓	
YES	NO

If you answered YES to Question 2 above, proceed to Question 3 below. If you answered NO to Question 2 above, proceed to Question 4 below.

3. Did plaintiff, MARK WIENER, sustain damages as a result of the breach of the above employment contract?

✓	
YES	NO

Proceed to Question 4 below.

Appendix C

4. Whether or not plaintiff, MARK WIENER, and defendants, LAWRENCE-PICASO, INC., LAWRENCE-PICASO INC. d/b/a LAWRENCE PROPERTIES, and LAWRENCE PROPERTIES, created a fiduciary relationship arising out of the employment of plaintiff by defendant?

YES	NO
	✓

If you answered YES to Question 4 above, proceed to Question 5 below. If you answered NO to Question 4 above and YES to each of Question 1, Question 2 and Question 3 above, proceed to Question 6 below. If you answered NO to Question 4 above and NO to either Question 1, Question 2 or Question 3 above, STOP, and report your verdict to the Court.

5. Whether or not plaintiff, MARK WIENER, breached said fiduciary duty?

YES	NO

If you answered YES to Question 5 above, proceed to Question 6 below. If you answered NO to Question 5 above and YES to each of Question 1, Question 2 and Question 3 above, proceed to Question 6 below. If you answered NO to Question 5 above and NO to either Question 1, Question 2 or Question 3 above, STOP, and report your verdict to the Court.

Appendix C

6. State the amount of damages, if any, awarded to plaintiff, MARK WIENER.

$205,000.00*

If you answered YES to Question 5 above, proceed to Question 7 below. If you answered NO to Question 5 above (or did not answer Question 5 as instructed), STOP, and report your verdict to the Court.

7. State the amount of compensatory damages, if any, awarded to defendants, LAWRENCE-P1CASO, INC., LAWRENCE-PICASO INC. d/b/a LAWRENCE PROPERTIES, and LAWRENCE PROPERTIES.

$_____

We, the undersigned jurors in this action, concur and answer the above Questions in accordance with the instructions of this Court and report our verdict as stated above, at least five (5) jurors have agreed on the answer to each Question.

---

* 4.5 years at $50,000/year includ. all benefits + salary, minus $20,000.00 unemployment insurance received to date and expected with regard to the current period.

Appendix C

Dated: Dec 21, 2000

s/ [illegible]
(1. Foreperson)

s/ [illegible]
(2)

s/ [illegible]
(3)

s/ [illegible]
(4)

s/ [illegible]
(5)

s/ [illegible]
(6)

APPENDIX D — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED NOVEMBER 14, 2001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

INDEX NO. 603935/99

MARK WIENER,

Plaintiff,

-against-

LAWRENCE-PICASO, INC., LAWRENCE-PICASO, INC. d/b/a LAWRENCE PROPERTIES and LAWRENCE PROPERTIES,

Defendants.

DECISION & ORDER

RYP, NORMAN C., J.:

Defendant's CPLR 2221 motion to reargue and plaintiff's CPLR 2221 cross-motion to reargue are consolidated for determination as follows.

Plaintiff's CPLR 2221 cross-motion to reargue is denied because the plaintiff failed to present any credible evidence the employment contract would be renewed. Plaintiff's argument that the employment contract would be automatically

renewed is undermined by the fact the defendant's terminated plaintiff on July 29, 1999, prior to the expiration of the initial term of the employment contract.

Defendant's CPLR 2221 motion to reargue is granted and the Order of this Court dated September 10, 2001, is modified to reflect the reduction of the amount awarded by employment benefits received by plaintiff in the stipulated sum of $19,900.00 to the sum of $34,266.67 ($54,166.67 [13 months at $4,166.67 per month] minus the employment benefits of $19,900.00).

Accordingly, plaintiff is entitled to a judgment in the sum of $34,266.67 plus interest from July 29, 199^, through December 21, 2000, plus interest to date of entry of judgment, as taxed by the Judgment Clerk, together with costs and disbursements.

Settle Order and Judgment.

Dated: 11/14/01

s/ Norman C. Ryp
NORMAN C. RYP
J.S.C.

APPENDIX E — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED SEPTEMBER 10, 2001

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 44

INDEX NO. 603935/99

MARK WIENER,

Plaintiff,

-against-

LAWRENCE-PICASO, INC., LAWRENCE-PICASO, INC. d/b/a LAWRENCE PROPERTIES and LAWRENCE PROPERTIES,

Defendants.

DECISION & ORDER

RYP, NORMAN C., J.:

After this jury Trial, defendants' move pursuant to CPLR 4404 to set aside the jury verdict which awarded plaintiff, Mark Wiener, $205,000.00 (four and one half years salary at $50,000.00 per year) for breach of an employment contract as against the weight of the evidence or in the alternative to reduce the verdict. Plaintiff cross-moves pursuant to CPLR 4404 for prejudgment interest from July 29, 1999, and to

strike the affidavit of Howard Kitain dated April 9, 2001. The above motions are consolidated for determination.

Defendants', in support, contend the plaintiff admitted acts of malfeasance including forgery of the signatures of two (2) building owners on official public forms and failed to perform his duties as provided for in the employment manual. Further defendants' contend the jury award should be reduced because there was no credible evidence presented that the employment agreement would be extended beyond it's stated minimum term of three (3) years.

In opposition, plaintiff contends the defendants did not terminate his employment because of any alleged forgery, and further that defendants ratified his actions. Plaintiff further contends he performed all duties as directed and further was not required to sign the employment manual. Finally, plaintiff contends the affidavit of Howard Kitain dated April 9, 2001, should be striken because it seeks to introduce into evidence certain evidence that was not adduced at Trial.

At Trial, conflicting evidence was presented regarding the acts of the plaintiff, with the issue being the credibility of each side's witnesses.

In order to set aside a jury verdict as against the weight of the credible evidence, there must be "no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." *Cohen v. Hallmark*, 47 NY2d 493 (1978).

Appendix E

Whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual determination which must be exercised with considerable caution based upon the absence of substantial justice, not simply an unsatisfactory verdict or one which the Court disagrees. *Cohen v. Hallmark, supra*; *Nicastro v. Park*, 113 AD2d 129 (2nd Dept. 1985).

In this case, the jury verdict finding a breach of the employment contract is amply supported by the credible evidence. Accordingly, the only issue before this Court is the amount of damages. While there was ample credible evidence of a breach, there was a lack of credible evidence regarding the probability of renewal of the subject employment contract. Therefore, this Court must reduce the jury award to include damages from the breach, on July 29, 1999, when plaintiff was terminated to the three year minimum date set forth in the employment contract (Pl. Ex. H.) of August, 2000. Accordingly, the jury award of $205,000.00 is reduced to $54,166.67 (13 months at $4,166.67 per month), plus applicable interest, costs and disbursements at entry of judgment hereunder.

Plaintiff's CPLR 4404 cross motion for interest is granted without opposition and plaintiff is entitled to the statutory interest from July 29, 1999, the date of the breach up to and including December 21, 2000, the date of the jury verdict pursuant to CPLR 5001 plus interest to date of entry of judgment hereunder. Plaintiff's cross-motion to strike the affidavit of Howard Kitain dated April 9, 2001, relating to present value of the jury award is denied as moot.

Appendix E

Accordingly, defendants' CPLR 4404 motion to set aside the jury verdict for breach of an employment contract as against the weight of the evidence or in the alternative to reduce the verdict and plaintiff's CPLR 4404 cross motion for prejudgment interest from July 29, 1999, and to strike the affidavit of Howard Kitain dated April 9, 2001, are partially granted and partially denied as set forth above. Acordingly, plaintiff is entitled to a judgment in the sum of $54,166.67 plus interest from July 29, 1999, through December 21, 2000, plus interest to date of entry of judgment, as taxed by the Judgment Clerk and costs and disbursements.

Settle Ordered and Judgment.

Dated: September 10, 2001

s/ Norman C. Ryp
NORMAN C. RYP
CLERK

APPENDIX F — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT DATED SEPTEMBER 17, 2002

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
FIRST JUDICIAL DEPARTMENT

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on September 17, 2002.

Present — Hon. Milton L. Williams, Presiding Justice,
David B. Saxe
Joseph P. Sullivan
David Friedman, Justices.

Mark Wiener,

Plaintiff-Appellant,

-against-

Lawrence-Picaso, Inc., et al.,

Defendants-Respondents.

Plaintiff-appellant having moved for reargument of or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court entered on June 27, 2002 (Appeal No. 1492),

Appendix F

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied. (See M-3877, decided simultaneously herewith.)

ENTER:

s/ Catherine O'Hagan Wolfe
Clerk

APPENDIX G — ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DENYING MOTION FOR LEAVE TO APPEAL DATED DECEMBER 17, 2002

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of December 2002

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

1-10 Mo. No. 1209

Mark Wiener,

Appellant,

v.

Lawrence-Picaso, Inc., et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX H — EMPLOYMENT CONTRACT OF AUGUST 26, 1997

EMPLOYMENT AGREEMENT OF
MARK WIENER

EMPLOYMENT AGREEMENT made this 26 day of August, 1997, by and between Lawrence Properties, a licensed real estate firm having its principle office at 855 Avenue of the Americas, New York, N.Y. 10001 ("Employer") and Mark Wiener, residing at 25 Central Park West, New York, N.Y. 10023 ("Employee").

WHEREAS, the Employer is engaged in the business of managing real estate and real estate brokerage; and

WHEREAS, the Employer wishes to employ Employee and Employee wishes to enter into such employment on the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the premises and mutual covenants herein contained, it is hereby agreed as follows:

1. Position. Employee shall be given the position of Management Executive with the responsibility of managing a portfolio of cooperative/condominium/rental buildings, including assisting other management executives with municipal agency requirements and assisting in the management of four properties in which Employee's family are the owners—5400 Fieldston Road, Riverdale, New York, New York; 3900 Greystone Avenue, Riverdale, New York, 165 Seaman Avenue, New York, New York and 880-902 Gerard Avenue, Bronx, New York (collectively, the "Ackerman Properties").

Appendix H

2. Compensation. As full compensation for all services rendered by the Employee pursuant to this Agreement, Employer agrees to pay Employee the minimum annual salary of $43,000. In the event that either or both of the following two properties enter into management-agreements with Employer while this Agreement is in effect and Mark Wiener is the precipitating cause for such properties to become managed by Employer, then Employee's annual salary shall increase by $3,500 for each such property. Those properties are: 235 East 49th Street, New York, New York and 210 West 19th Street, New York, New York. Employer shall review Employee's salary on an annual basis and may increase Employee's salary but in no event shall Employee's annual salary be set below the higher of $43,000 or the Employee's annual salary after taking into account an increase in salary as described in this section, if any.

3. Medical Benefits. After 90 days of employment, Employee will become enrolled in Employer's single coverage medical and dental plans and the cost thereof shall be paid by Employer. During such 90 day period, Employer shall pay Employee's COBRA expenses before Employee's inclusion in Employer's medical and dental plans.

4. Vacation and Retirement Plan. Employee shall be entitled to two weeks annual vacation but shall not take any such vacation during the first six months of employment under this Agreement. Employee shall be entitled to seven paid sick days per year and two paid personal days. Employee shall become vested in Employer's 401(k) plan no later than one year after employment hereunder. The Employee's

vacation and retirement plan participation shall be governed by Employer's company manual and shall be subject to change in the event of changes in the Employer's company manual for all employees.

5. Tern of Employment. The term of this Agreement shall be for a minimum of three years from the date of this Agreement and thereafter shall automatically renew on a year to year basis. This Agreement may be terminated by Employee upon fourteen days prior written notice. Employer may terminate this Agreement upon fourteen days prior written notice only based upon activity by Employee which constitutes willful non-performance or malfeasance, provided, however, that Employer shall also be able to terminate this Agreement upon fourteen days prior written notice in the event that the Ackerman properties are no longer being managed by Employer.

6. Reassignment. Only in the event that Employee's performance fails to satisfy reasonable standards for that of a property manager, then Employer may reassign Employee to lesser duties than that of a property manager. Before such reassignment, Employer shall have given Employee written notice setting forth the areas where Employee has failed to perform adequately and shall provide Employee with a three month period to correct such deficiencies. In the event that Employee fails to correct such deficiencies after such three month period, then Employer may reassign Employee as set forth above. In such event, Employee shall still be entitled to the minimum annual salary as set forth in Section 2. Nothing herein shall restrict Employer from assigning to

Employee such buildings that Employer, in its sole discretion, deems necessary or advisable, regardless of the performance of the Employee on any building account.

7. Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York.

8. Entire Agreement. This Agreement sets forth the entire agreement and understanding of the parties relating to the subject matter hereof, and supersedes all prior agreement, arrangements and understandings, written or oral, relating to the subject matter hereof.

9. No Waiver. The terms or covenants hereof may be waived, only by a written instrument executed by the parties hereto, or in the case of a waiver, by the party waiving compliance. The failure of either party at any time or times to require performance of any provision hereof shall in no manner affect the right at a later time to enforce the same.

10. Notices. All notices, consents and other communications hereunder shall be in writing and shall be sent by personal delivery or regular mail to the address of the receiving party set forth at the beginning of this Agreement or such other address as the party receiving notice or its assignees shall designate by written notice furnished to the sending party. All notices, consents, and other communications shall be deemed to have been sufficiently given upon receipt of the document if the document is personally delivered or five business days after the date of the mailing thereof if the document is mailed.

Appendix H

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above.

LAWRENCE PROPERTIES

s/ [illegible]
By:
Title: President

MARK WIENER
s/ Mark Wiener

Supreme Court, U.S.
FILED
MAY 19 2003
OFFICE OF THE CLERK

No. 02-1364

In the

Supreme Court of the United States

MARK WIENER,

Petitioner,

v.

LAWRENCE -PICASO,INC., LAWRENCE PICASO, INC. d/b/a LAWRENCE PROPERTIES and LAWRENCE PROPERTIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT, STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

Mark J. Alonso
Counsel of Record
Alonso, Andalkar & Kahn, P.C.
275 Madison Avenue
New York, NY 10016
(212) 972-4400
Attorneys for Respondents

CURRY & TAYLOR ♦ (202) 393-4141 ♦ HTTP://USSCINFO.COM

QUESTIONS PRESENTED

Respondents-Employers submit that the following questions more accurately reflect the fundamental legal question presented below.

1. Where a jury finds that an employee has been wrongfully discharged, is it an abuse of discretion by the Trial Court to limit the damages to the wages and benefits for the unexpired term on his employment contract?

The Appellate Division properly answered this question in the negative and held the damages were properly reduced.

2. Where an employee of a real estate management company is employed pursuant to a written employment agreement for an initial three-year term was it an abuse of discretion for the Trial Court to reduce a jury verdict from an award of 4½ years of salary to the 13 months left on the initial term where the employee has (a) forged the names of building owners on official New York City forms in violation of various company policies, New York State statutes and New York City ordinances, (b) defamed and disparaged the employer to its clients, to wit, owners of buildings it manages; (c) violated the office policies of the employer by failing to call in when taking sick days, (d) violated the minimum standards of performance set by the employer and Appellant's own expert witness regarding visitation and care of the buildings in his care, (e) been non-responsive, rude and obnoxious to tenants and building owners, (e) failed to honor the work hours of the employer; (f) utilized his

position at the employer management company to deliberately grant benefits to his mother, a partner on certain properties, to the detriment of his mother's other partners and particularly prejudicial to the interest of one partner who was particularly despised by his mother, and (f) had refused to modify his behavior after repeated notices and warnings?

The Appellate Division answered this question in the negative and held that the reduction was proper.

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Respondents Lawrence-Properties, Inc., Lawrence-Picaso, Inc., d/b/a Lawrence Properties and Lawrence Properties [hereinafter "Respondents-Employers"] request that this Court deny the Petition for Certiorari filed by Mark Weiner [hereinafter "Petitioner-Employee"], seeking review of the decision of the Supreme Court of the State of New York, Appellate Division, First Department entered in this case on September 17, 2002.

COUNTER-STATEMENT OF THE CASE

In a jury trial held in December, 2000, the testimony of the Petitioner-Employee himself showed that, in his capacity of property manager, he had, *inter alia*, forged the signatures of building owners on documents which were required to be filed with the City of New York, he had disparaged the Respondents-Employers during his employment to its own clients, and he had failed to visit buildings under his care-even to the minimal standard testified to by his own expert.

On December 21, 2000, after a jury trial, Petitioner-Employee obtained a verdict against Respondents-Employers in the amount of $205,000.00. This represented salary not only for the unexpired term of the Petitioner-Employee's employment agreement (13 months), but for an extra three and a half years past the end of the employment agreement (for a total award of 4½ years of salary and benefits). Respondents-Employers made a post-trial motion to reduce the jury verdict, which was granted by the Trial Court on February 5, 2002. The Trial Court ordered a reduction in the amount of damages and awarded judgment to the Petitioner-Employee in the reduced amount of $34,266.67. This sum represented the amount of salary

due Petitioner-Employee for the remainder of the initial term of his employment contract. On or about February 5, 2002, Petitioner-Employee filed a Notice of Appeal with the Appellate Division,[1] First Department [hereinafter "Appellate Division"]. On March 18, 2002 Respondents-Employers were served with a Note of Issue.

Petitioner-Employee had sued for wrongful termination of an employment agreement under which he had been hired by Respondents-Employers as a property manager. Respondents-Employers contended that the termination was warranted based upon, *inter alia*, the Petitioner-Employee's egregiously poor performance of his duties while an employee, which included, *by his own admission*, his forgery of the signatures of building owners on official government documents, his disparagement of Respondents-Employers to their clients, his failure to follow company policy with respect to visiting his buildings and calling in sick, and his constant rudeness to tenants and building owners.

Contrary to the Petitioner-Employee's misrepresentation of the facts asserted in his Petition, the record below clearly demonstrates that Petitioner-Employee admitted that he forged the signatures of building owners on Multiple Dwelling Registration forms which are required to be filed with the City of New York. [RA-28, lines 22 to RA-29, lines 10, RA-29, lines 13-24 to RA 30, lines 4 to 14]. In fact, it is indisputable that Petitioner-Employee willfully forged the names of the owners of the buildings. He did not

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1. The Appellate Division of the Supreme Court of the State of New York is the intermediate court of appellate review in the State of New York. The New York Court of Appeals is New York State's highest court.

testify that he negligently placed the signatures on the documents. [RA-28, lines 22 to RA-29, lines 10, RA-29, lines 13-24 to RA 30, lines 4 to 14]. He did not testify that he had forged the names as an office prank and that the forms had accidentally been filed. He did not allege that he signed the owners' names under the erroneous impression that he had been given a power of attorney. [RA-28, lines 22 to RA-29, lines 10, RA-29, lines 13-24 to RA 30, lines 4 to 14].

Rather, Petitioner-Employee *admitted* that he knew that he was not the owner of the buildings, he did not think he had authority to sign the owners' signature, he willfully put his pen to the paper on the line of an official government form and willfully signed the name of another person. [RA-164, line 23 to RA-165, line 6]. Further, Petitioner-Employee's argument that the building owners were unavailable to sign was belied by the fact that Petitioner-Employee had a month to get the forms properly signed, they were available, and that one signatory (the representative of a building owner) sat at a desk just a few feet away from Petitioner-Employee's desk. [RA-28, lines 22 to RA-29, lines 10, RA-29, lines 13-24 to RA-30, lines 4-14, RA-79, lines 6-13.] Petitioner-Employee's admitted forgery is demonstrative of his malfeasance and wrongful misconduct and fully supports the Trial Court's finding that the employment agreement would not have been renewed.

Petitioner-Employee further claims that Respondents-Employers never gave him written notice of his substandard performance. However, even if true (which it is not), that was not an issue presented during the appeal and as such, this issue is not before this Court. Nevertheless, the trial was replete with exhibits documenting Petitioner-Employee's substandard performance, and notice to him thereof, including

memos to the file, letters to the Petitioner-Employer and to his attorney during his employment and complaints from tenants about his performance. [RA-772, RA-773, RA-783, RA-784, RA-785, RA-787, RA-795, RA-797, RA-799, RA-804.]

Additionally, Petitioner-Employee admitted that he failed to visit his buildings with sufficient frequency to satisfy even the *de minimis* standards of his own expert, much less those of the Respondents-Employers.[2] Petitioner-Employee's spurious excuse that his superiors never told him how often he was supposed to visit his properties and make building visits was belied by the testimony of all concerned, including his own testimony and that of his own expert. It was generally agreed that one of the biggest responsibilities of a property manager is to visit properties in his care. Petitioner-Employee's family business is the ownership of properties in Manhattan, and he was hired based upon his self-professed years of experience in the field of real estate management. Finally, and most importantly, the Petitioner-Employee's own expert admitted that a property manager was obligated to visit his properties at least once a month and more for larger buildings, a standard which Petitioner-Employee admitted he never came close to achieving. [A-239, lines 7-8.] Rather, Petitioner-Employee admitted that he only visited the apartment buildings under his care "when he felt it was necessary." [RA-175, lines 17-18.] When asked if he was supposed to report to a building a certain number of times, Petitioner-Employee replied "No." [RA-176, lines 23-25.] Respondents-Employers'

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2. Respondent-Employers' standards were set higher than those of other real estate management companies, which is why it was awarded the 2000 New York Association of Residential Managers Management Company of the Year Award. [RA-312, lines 21-25.]

witnesses testified that property managers were supposed to visit their buildings once or twice a week. [RA-313, lines 10-11]; [RA-522, line 6].

This conduct obviously constituted another one of the many "non-performance" portions of the "willful non-performance" ground for terminating Petitioner-Employee under his Employment Agreement. In fact, to show the "willful" portion of the non-performance, Respondents-Employers' witnesses testified that Petitioner-Employee had received numerous warnings about his failure to visit his buildings. [RA-736, line 22 to RA-737, line 18]; [RA-316, lines 8-14]; [RA-646, line 16, to RA-647, line 4]; [RA-309, lines 4-11]. In one 12 month period, Petitioner-Employee's own records showed that he visited his five buildings only 21 times, whereas a once-a-month standard would have required 60 visits! [See, Trial Exhibit PP, RA- 805-816.] Over the entire 22 months of his employment, Petitioner-Employee never met the minimum once a month threshold of building visits established by his own expert (i.e. 22 months x 5 buildings = 110 visits).

There was also substantial evidence presented to the Trial Court with regard to the Petitioner-Employee's disparagement of the Respondents-Employers to its own clients. In fact, the Petitioner-Employee testified with regard to the disparagement of Respondents-Employers upon questioning in the Trial Court. [RA-108, line 17 to RA-109, line 9]. Furthermore, there was evidence presented that the Petitioner-Employee was not compelled to disparage the Respondents-Employers, rather, he eagerly volunteered to do so. [RA-111, lines 5 to 16]. Witnesses confirmed that Petitioner-Employee made disparaging comments about the Respondents-Employers. [RA-34, lines 20-24, RA-538, lines 2-13]. This evidence supported the Trial Court's post-trial

finding that there was no evidence to establish that Petitioner-Employee's employment agreement would have been renewed. It was on this record (which included numerous other instances of Petitioner-Employee's egregiously insubordinate and inadequate performance of his job duties), plus the well-settled law in New York that damages for wrongful termination are strictly limited to the unexpired term of the employment agreement, that caused the Trial Court to reduce the jury's award to the salary only for the 13 month balance of the initial term of the employment agreement.

On June 7, 2002, Petitioner-Employee's appeal from the Trial Court's reduction of the damage award was heard before the Appellate Division. By decision dated June 27, 2002, the Appellate Division affirmed the Trial Court's ruling [hereinafter "Appellate Court Decision"]. Thereafter, Petitioner-Employee moved before the Appellate Division for leave to appeal to the Court of Appeals. On September 17, 2002, the Appellate Division denied said motion. Petitioner-Employee next sought leave of the Court of Appeals to appeal. On December 17, 2002, the Court of Appeals denied Petitioner-Employee's motion for leave to appeal.

In stating his questions presented for review before this Court, Petitioner-Employee has impermissibly side-stepped the issues which formed the basis for the Trial Court's reduction of the jury's damage award, of the Appellate Division's affirmance and of the Court of Appeals' refusal to disturb the holdings below. Rather, Petitioner-Employee erroneously contends, now for the first time, that the Appellate Division's affirmance vitiated Petitioner-Employee's constitutional right to a jury trial, violated Petitioner Employee's due process rights, and, violated Petitioner-Employee's right to equal protection of the law.

In light of (a) the Petitioner-Employee's failure to raise certain issues in earlier appeals, (b) the well-settled constitutionality of a trial court's right to reduce an excessive award of damages, and (c) the substantial facts which support the Respondents-Employers' termination of Petitioner-Employee, this Court should deny this application. Every court (the Trial Court, the Appellate Division, and both the Appellate Division and the Court of Appeals in denying leave to appeal to the Court of Appeals) has come to the conclusion that a reduction of the damages was appropriate based upon the facts presented. As a result of Petitioner-Employee's mischaracterization of the issues presented, Respondents-Employers are constrained to clarify the issues decided by the Appellate Division and affirmed by the Court of Appeals.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER-EMPLOYEE FAILED TO RAISE CLAIMS IN THE APPELLATE DIVISION

Petitioner-Employee's Petition for a Writ of Certiorari must be denied because he failed to raise claims in his appeal that he raises herein. In *Campino v. United States*, 968 F.2d 187, 190 (2d Cir. 1992), the Court stated that "[T]he failure to raise a claim on direct appeal is itself a default of normal appellate procedure, which results in a procedural default." *United States ex re. Regina v. LaVallee*, 504 F.2d 580 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975). In *Norwood v. Attorney General of the State of New York*, 1986 WL 1449 (S.D.N.Y. 1986), the Court ruled that issues not raised in petitioner's application for leave to appeal to the Court of Appeals may not be considered by the instant Court.

Moreover, this Court stated the following in *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992):

> As a court of review, not one of first view, we will entertain issues withheld until merits briefing 'only in the most exceptional cases.'

Escondido, 503 U.S, at 535, 112 S.Ct. at 1533.

Petitioner-Employee incorrectly states that the first opportunity he had to assert his constitutional claims regarding due process, equal protection, and the Seventh Amendment were in his motion to the Appellate Division for reargument and for leave to appeal to the Court of Appeals. This is absolutely untrue; Petitioner-Employee could have – and should have – raised these arguments in opposition to Respondents-Employers' motion to reduce the damage award before the Trial Court and raised them again in his appeal to the Appellate Division; he did not do so. Even in his first post-appeal motion to the Appellate Division, although Petitioner-Employee only touched upon the alleged violation of his due process rights and Seventh Amendment rights, he completely failed to address his equal protection claim. Hence, the Petitioner-Employee's failure to raise this claim in the Appellate Division or before the Trial Court mandates denial of Petitioner-Employee's instant petition.

II. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTIONS PRESENTED BY THE PETITIONER

The issue presented for review was whether the Trial Court abused its discretion in limiting the damages

on the Petitioner-Employee's remaining breach of contract claim to the wages and benefits for the unexpired term on Petitioner-Employee's employment contract, to wit, thirteen months. The Appellate Division found that this was not an abuse of discretion given that the trial was

> replete with testimony demonstrating that plaintiff's actions, while in the defendant's employ, including failing to visit the buildings which he managed and forging the signatures of property owners on New York City Multiple Dwelling Registration Forms, constituted willful non performance and malfeasance, and as such, justified non-renewal of the employment agreement.
>
> The trial court's finding was warranted as a matter of law since there was 'no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury'. (see, *Cohen v. Hallmark Cards, Inc.*, 45 NY2d 493, 499)

[App. A, at 2a-3a][3]. The trial record presented to the Trial Court and the Appellate Division provided ample evidence of instances of willful misconduct, to wit, the Petitioner-Employee's forgery of the signatures of building owners on official documents, his blatant disparagement of Respondents-Employers to their clients, his failure to follow company policy with respect to visiting his buildings and with respect to calling in sick, his inattentiveness and rudeness to both tenants

[3] Citations in the form "App.__" are to the Appendix to Petitioner-Employee's petition.

and building owners, his violation of the minimum standards of performance set by the Respondents-Employers and Petitioner-Employee's own expert witness regarding visitation and care of the buildings in his care, his misuse of his position at the Respondents-Employers' management company to deliberately grant benefits to his mother, a partner on certain properties, to the detriment of his mother's other partners and his refusal to modify his behavior after repeated notices and warnings.

In affirming the Trial Court's decision, the Appellate Division merely agreed that, on the basis of the evidence presented at trial, there was no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury. By denying leave to appeal, the Court of Appeals affirmed this decision. Respondents recognize that the Court is not bound by the decisions below. However, the unanimity of the appellate judges strongly suggests the correctness of their holdings.

III. THE DECISION BELOW WAS CORRECT AND THE PETITIONER-EMPLOYEE'S RIGHT TO DUE PROCESS, RIGHT TO EQUAL PROTECTION OF THE LAW, AND SEVENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE APPELLATE DIVISION

As is shown below, the Petitioner-Employee's claims that the Appellate Division violated his constitutional rights to due process, equal protection of the laws, and the Seventh Amendment are completely without merit. The Petition's blunderbuss approach to the assertion of meritless constitutional objections

should not invoke this Court's intervention. Consequently, there is no basis for review here.

A. The Petitioner-Employee's Seventh Amendment Right to a Jury Trial Has Not Been Violated

The Petitioner-Employee has not been denied his Seventh Amendment Right to a jury trial. In the instant case, the Trial Court merely reduced the jury award of damages and the Appellate Division affirmed the Trial Court's decision to reduce the jury award. The Seventh Amendment provides:

> 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'
>
> [N]o fact tried by a jury shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law.

Petitioner-Employee was afforded his right of trial by a jury. Nonetheless, the remedies of *additur* and *remittitur*, which provide for modification of a jury award, are well-settled principles of Anglo-Saxon law and are unquestionably constitutional. In fact, a court's inherent right to issue a judgment *non obstante verdicto* predates both the United States and New York State Constitutions. In *Dimick v. Schiedt*, 55 S.Ct. 296, 293 U.S. 474, 79 L.Ed. 603 (1935), this Court held that in accordance with the established principles of common

law, a court has the inherent power to reduce a jury award of damages. Specifically, this Court stated in *Dimick v. Schiedt*, the following:

> It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk v. United States*, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369, 93 A.L.R. 1136. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations (8th Ed.) 124.

Dimick, 55 S.Ct. at 301, 293 U.S. at 487.

As such, the Trial Court's reduction of the jury award was constitutional. In fact, the post-trial motion for judgment notwithstanding the verdict is codified in NYCPLR 4401 and 4404(a). Both of these sections are substantively identical and differ only to the extent that the latter is made following the verdict and the former

prior to the factfinder's rendering of its verdict. NYCPLR 4404(a) states as follows:

> After a trial of a cause of action or issue triable of right by a jury upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . . .

In considering the merits of a party's Motion for Judgment Notwithstanding the Verdict, the factfinder's conclusions regarding the evidence are not germane; rather, the court in *Cohen v. Hallmark Cards, Inc.* 45 N.Y.2d 493, 328 N.E.2d 1145, 410 N.Y.S.2d 282 (1978) stated that, in order to support a conclusion to set aside a jury's verdict, the following threshold requirements must first be met:

> It is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict.

45 N.Y.2d at 499.

Also, as discussed in more detail below, although phrased as a direction to New York's intermediate appellate courts, NYCPLR 5501(c)'s standard that states that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation, as construed by New York's courts, instructs state trial judges as well. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 425, 116 S.Ct. 2211, 2218, 135 L.Ed.2d 659 (1996). NYCPLR 5501(c) provides:

> The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Another case, wherein this Court addressed the rules of remittitur and additur is *Fox v. City University of New York*, 1999 WL 33875 (S.D.N.Y. 1999). In *Fox*, the Court stated as follows:

> . . . federal courts may not make orders of additur. That has been clear at least since 1935, when the Supreme Court held in

> *Dimick v. Schiedt*, 293 U.S. 474 (1935), that a federal court's order of additur would violate the Seventh Amendment. Plaintiff at bar suggests that *Gasperini* changes that holding, but Justice Ginsburg's opinion shows that is not so. The opinion enumerates exercises of a trial judge's discretionary authority that are not inhibited by the re- examination clause of the Seventh Amendment, stating in that regard: The Seventh Amendment, "which governs proceedings in federal court, but not in state court," *Gasperini*, 116 S.Ct. at 2222 (footnote omitted), provides that "no fact tried by a jury, shall be otherwise re- examined in any Court of the United States, than according to the rules of the common law." **This discretion includes overturning verdicts for excessiveness** and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur). See *Dimick v. Schiedt*, 293 U.S. 474, 486-487, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935) (recognizing that remittitur withstands Seventh Amendment attack, but rejecting additur as unconstitutional).
> (emphasis added). 116 S.Ct. at 2222.

Fox, at 1999 WL 33875 (emphasis supplied).

In consonance with the foregoing, the Trial Court properly reduced the jury award of damages. Petitioner-Employee has incorrectly stated that his constitutional right to jury trial was violated when the Trial Court reduced the jury award of damages, which the

Petitioner-Employee blatantly mischaracterizes as a modification of the issue of liability. [Petition, at p.13.] The Trial Court confirmed that the evidence adduced on Petitioner-Employee's own direct case, proved that he committed "willful non-performance" and/or "malfeasance" as a matter of law and that, their evident sympathy for Petitioner-Employee aside, there was no valid line of reasoning or permissible inference which could possibly lead rational persons to the conclusion reached by the jury. Contrary to Petitioner-Employee's contentions, the trial court found, after conducting the trial and after careful post-trial review of the evidence that the jury verdict was against the weight of evidence presented. Thus, the foregoing NYCPLR provisions, allowing a court to set aside a jury verdict, are not inherently unconstitutional. Based on the foregoing, the Petitioner-Employee was not denied his Seventh Amendment Right to a jury trial.

Additionally, the Appellate Division's Decision to unanimously affirm the Trial Court's damage reduction was well within its discretion and constitutional in all respects. This Court has stated in *Thompson v. Utah*, 170 U.S. 343, 350, 18 S.Ct. 620, 42 L.Ed. 1061 (1898) and *Patton v. United States*, 281 U.S. 276, 288, 50 S.Ct. 253, 74 L.Ed. 854, (1930) that, to understand the scope and meaning of the Seventh Amendment, one must apply the appropriate common law rule established at the time of the adoption of that constitutional provision in 1791.

In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), this Court held that under New York law, appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation." This Court also stated as follows:

> In both state and federal courts, trial judges made the excessiveness assessment in the first instance, and appellate judges ordinarily deferred to the trial court's judgment. See, e.g., *McAllister v. Adam Packing Corp.*, 66 App.Div.2d 975, 976, 412 N.Y.S.2d 50, 52 (3d Dept.1978) ('The trial court's determination as to the adequacy of the jury verdict will only be disturbed by an appellate court where it can be said that the trial court's exercise of discretion was not reasonably grounded.'); *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (C.A.2 1984) ('The trial court's refusal to set aside or reduce a jury award will be overturned only for abuse of discretion.').

Gasperini, 518 U.S. at 422, 116 S.Ct. 2217.

Additionally, the court in *Fox v. City University of New York*, 1999 WL 33875 (S.D.N.Y. 1999), further stated:

> If the court makes an order of remittitur (for a lower amount) or additur (for a higher amount), the parties may stipulate to accept that amount, or undergo a new trial on damages. That both remittitur and additur are contemplated by § 5501 is made plain by its language; the statute applies to a litigant's contention 'that the award is excessive or inadequate,' and instructs the appellate division 'that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation' (emphasis added).

Fox, at 1999 WL 33875.

Based on the well-settled law, the Appellate Division's affirmance of the Trial Court's damage reduction was well within its discretion and was constitutional. The Trial Court found that the jury award of damages was against the weight of evidence presented and the Appellate Division affirmed that finding. Contrary to the Petitioner-Employee's position, the Appellate Division never directed a verdict that the Petitioner-Employee had committed forgery, had failed to visit the buildings he was managing, or that he had received written notice from Respondents-Employers of his malfeasance. The jury had already determined these issues in the Trial Court, as more thoroughly detailed in the counter-statement of facts, and awarded damages to the Petitioner-Employee. The Trial Court did not nullify the jury's verdict of liability, it merely reduced the damage award. Similarly, the Appellate Division respected the jury's finding of liability and merely affirmed the Trial Court's reduction of the jury's award of damages to the unexpired term of the employment agreement.

In an action in New York for wrongful discharge,

> [i]t is well settled that the optimum measure of damages for wrongful discharge under a contract of employment is the salary fixed by the contract for the unexpired period of employment . . . .

Amaducci v. Metropolitan Opera Association, 33 A.D.2d 542, 543, 304 N.Y.S.2d 322, 323 (1st Dept. 1969). See, *Howard v. Daly*, 61 N.Y. 362, 371-4 (1875); *Milage v. Woodward*, 186 N.Y. 252, 257, 78 N.E. 873 (1906); *Ware Bros. Co. v. Cortland Cart & Carriage Co.*, 192

N.Y. 439, 442, 85 N.E. 666 (1908); *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 354, 358, 169 N.E. 605 (1930). Hence, the reduction of the damage award to the balance of the initial term of the employment contract is completely in keeping with New York law.

Hence, Petitioner-Employee cannot assert that he has been denied his Seventh Amendment Right to Jury Trial on the aforementioned issues. Accordingly, Petitioner-Employee has not sustained its burden of proof and, its Petition for Writ of Certiorari must be denied.

B. The Petitioner–Employee's Due Process Rights Were Not Violated

The Petitioner-Employee has failed to allege that his due process rights were violated in that he has failed to allege that he has been deprived of any property without due process of law and that he has been deprived of any notice or an opportunity to be heard. While it is understood that a cause of action is a "species of property protected by the 14th Amendment," *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982), a jury verdict in and of itself is not a species of property. Governmental action that is alleged to have violated the Due Process Clause may only be successfully challenged when it can be shown that it deprives a litigant of a property or liberty interest. *General Elec. v. New York Department of Labor*, 936 F.2d 1448, 1453 (2d Cir. 1991). Furthermore, to claim a property interest in a benefit, a plaintiff must show more than an abstract need or desire for it or a unilateral expectation of it. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *Story v. Green*, 978 F.2d 60, 62 (2d Cir. 1992).

Moreover, the existence of such property interests depends on "state law-rules or understandings that secure certain benefits and support claims of entitlement, *Board of Regents v. Roth*, 408 U.S. at 577, 92 S.Ct. at 2709, such as a state contract or statute. *S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962, 965 (2d Cir. 1988). Lastly, in addition to a cognizable property right, the plaintiff must allege that governmental action with respect to that property right amounts to a "deprivation" and that the deprivation occurred without due process. *Greene v. Town of Blooming Grove*, 935 F.2d 507, 510 (2d Cir. 1991); *Fusco v. Connecticut*, 815 F.2d 201, 205 (2d Cir. 1987).

Applying the aforementioned legal standard, Petitioner-Employee's assertions of deprivation are entirely illusory, since Petitioner-Employee's application fails to allege facts showing that state action deprived him of a protected property interest. *Story v. Green*, 978 F.2d 60, 62 (2d Cir. 1992) (citing *Board of Regents v. Roth*, 408 U.S. 564, 576- 79, 92 S.Ct. 2701, 2708-10 (1972)).

In fact, this Court should note that Petitioner-Employee received more than ample due process. Petitioner-Employee was not only afforded due process by the Trial Court in its consideration of the post-trial motion to reduce the verdict of damages, but also by the Trial Court when it heard reargument of that post-trial motion, and then by the Appellate Division when it reviewed the Trial Court's reduction of damages, and then by the Appellate Division again when it denied the Petitioner-Employee's motion for leave to appeal to the Court of Appeals, and finally by the Court of Appeals when it too denied leave to appeal. It is hard to imagine what greater process of law could have been afforded to Petitioner-Employee. At every leg of this legal journey,

the Petitioner-Employee was on notice that the court was being asked to either reduce the jury's award of damages or affirm such reduction.

Petitioner-Employee further claims that he did not have an opportunity to be heard before the Appellate Division on the feigned issue of liability with regard to the forgeries, building visits, and written notice of his malfeasance. This is simply untrue. The purported issue of liability was never raised before the Appellate Division, thus, Petitioner-Employee's right to adjudicatory procedure was protected. Specifically, Petitioner-Employee presented his claim to a jury. The jury made its decision with regard to the liability issues. The jury rendered its verdict and the Respondents-Employers made a post-trial motion to reduce said jury verdict, which was appropriately granted by the Trial Court. Petitioner-Employee then filed a Notice of Appeal with the Appellate Division seeking a reversal only on the issue of damages. [A-3 and Respondents-Employers' Appendix A.]

Petitioner-Employee had an opportunity to be heard before the Appellate Division in briefs and in oral argument. The Appellate Division affirmed the Trial Court's decision to reduce the jury verdict. Petitioner-Employee then moved before the Appellate Division for leave to appeal to the Court of Appeals. Thus, Petitioner Employee had been given yet another opportunity to be heard and present his case. Thereafter, Petitioner-Employee moved before the Court of Appeals for leave to appeal. The Court of Appeals denied the Petitioner-Employee's motion for leave to appeal. Altogether, Petitioner-Employee has had numerous opportunities to be heard and therefore has not been deprived of any rights. By denying leave to appeal, the Appellate Division and the Court of Appeals

both recognized that Petitioner-Employee failed to present any constitutional questions regarding entitlement.

C. The Appellate Division Limited Its Decision To The Issue Presented in The Notice of Appeal

The Petitioner-Employee's own Notice of Appeal to the Appellate Division states that the Appellant appeals "to the extent that such Order and Judgment (i) reduced the jury's verdict in favor of plaintiff and against defendants from $205,000.00 to $34,266.67." [A-3 and Respondents-Employers' Appendix A.] Thus, the Petitioner-Employee appealed from that part of the Order and Judgment only to the extent that it focused on damages. The Trial Court expressly acknowledged that the issue before it was one of damages. Specifically, the Trial Court stated, "Accordingly, the only issue before this Court is the amount of damages." [Appendix E, at p. 18a].

Petitioner-Employee's reliance on *Vias v. Rohan*, 119 A.D.2d 672, 501 N.Y.S.2d 109 (2nd Dept 1986) is entirely misplaced. In *Vias*, plaintiff commenced an action for wrongful eviction, breach of the warranty of habitability and intentional infliction of emotional distress. 501 N.Y.S.2d at 110. The Court only awarded damages on the emotional distress claim, but Plaintiff thought all her claims should have been redressed (an issue of liability). However, the Notice of Appeal was limited to that portion of the judgment which is "on the amount of damages." *Id.* Ms. Vias averred that she intended to raise the issue of liability on appeal, but incorrectly limited herself by the language set forth in the Notice of Appeal. Nonetheless, the Notice of Appeal excluded from consideration any question of liability.

In this case, Petitioner-Employee has completely failed to offer any explanation for his failure to assert these constitutional objections to the Trial Court. The Petitioner-Employee's Notice of Appeal took an appeal "to the extent that such Order and Judgment (i) reduced the jury's verdict in favor of plaintiff and against defendants from $205,000.00 to $34,266.67." Petitioner-Employee raised no question as to liability. The Appellate Division affirmed that ruling. Petitioner-Employee cannot resurrect this issue which he waived in his Notice of Appeal.

Accordingly, based on the Notice of Appeal, the Trial Court's findings and Petitioner-Employee's own admissions, it is indisputable that the issue on appeal was one of damages, not credibility or liability. Based on the facts above, Petitioner-Employee cannot contend that he was denied due process of law. Thus, the Appellate Division's ruling was appropriate and consistent with Petitioner-Employee's constitutionally protected rights.

D. The Petitioner-Employee's Right to Equal Protection of the Laws Has Not Been Violated

The Petitioner-Employee has not been denied his rights to equal protection of the laws because he has not been denied of any adjudicatory procedure on the alleged liability issues nor has he alleged that he has sustained any class-based invidious discrimination. When courts address a claim of deprivation of Equal Protection rights, the situations generally fall into two distinct groups. The first group consists of situations where a statute is being challenged on constitutional grounds. The general rule for this first group of cases is that "[w]hen a statute neither impinges on a

fundamental right guaranteed by the Constitution nor uses a classification based on a suspect criterion such as race, nationality, alienage, or gender, the law generally will not be found to violate the Equal Protection Clause unless it has no reasonable or rational basis" *Story v. Green*, 978 F.2d 60, 63-64 (2d Cir. 1992). The present situation does not fall within the group of cases challenging the constitutionality of a statute.

The second group of cases deals with a facially lawful statute which is being applied by the state in a manner which would deprive a person of equal protection. When addressing a claim of selective application of a facially-lawful state regulation, the Second Circuit has stated that there must be a finding that:

> (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person"

FSK Drug Corp. v. Perales, 960 F.2d 6, 10 (2d Cir. 1992).

The present situation has no relation to the two groups of cases that fall within the purview of the Equal Protection Clause. To the contrary, the facts of this case show that Petitioner-Employee received equal protection of the law. The Petitioner-Employee states that the New York State Appellate Division deprived him of his right to equal protection of the laws by depriving

him of any adjudicatory procedure on the alleged liability issues of forgery, building visits, and written notice of malfeasance. [Petition, at p. 19].

As mentioned earlier, Petitioner-Employee was afforded his full rights when the jury heard and saw all the evidence and witnesses presented to them in the Trial Court by both the Petitioner-Employee and the Respondents-Employers. Specifically, Petitioner-Employee presented his claims to the jury and the jury after hearing all the evidence, rendered its verdict. Respondents-Employers made a post-trial motion to reduce the jury verdict and the Trial Court granted said motion. Petitioner-Employee filed an appeal with the Appellate Division seeking only a review of the issue of damages. Petitioner-Employee had an opportunity to be heard before the Appellate Division and the Appellate Division affirmed the Trial Court's decision to reduce the jury verdict. Petitioner-Employee moved before the Appellate Division for leave to appeal to the Court of Appeals. Based on the foregoing facts, the Petitioner-Employee cannot now assert that he did not receive any type of adjudicatory procedure and was denied his equal protection rights. In fact, it is fatal to Petitioner-Employee's equal protection claim that he was not deprived of any adjudicatory procedure on the liability issues. The only issue appealed and affirmed by the courts was the reduction of the jury's damage award.

Even if Petitioner-Employee was denied an opportunity to be heard on liability issues, his assertion that his right to equal protection of the laws has been violated would still fail. This is true because Petitioner-Employee does not fit into a suspect class, nor can he allege that he has been treated differently than anyone else. The equal protection clause in the United States Constitution is essentially a direction that all persons

similarly situated should be treated alike. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3253-54, 87 L.Ed.2d 313 (1985). It prohibits states and local governments from acting, through the passage or application of law, in a way which discriminates against one or more classes or people. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979); *Avery v. Midland County, Texas*, 390 U.S. 474 (1968). A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual. *Huebschen v. Department of Health and Soc. Serv.*, 716 F.2d 1167, 1171 (7th Cir.1983) (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (footnote omitted) (emphasis added.)) Moreover, "The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). Here, Petitioner-Employee has not asserted that he was intentionally discriminated against by virtue of membership in a particular class or group.

Thus, this failure to allege any class-based invidious discrimination is fatal to the Petitioner-Employee's equal protection claim. In this action, it is unclear what improper class-based discrimination the Appellate Division is alleged to have violated in affirming the Trial Court's decision. Additionally, Petitioner-Employee has failed to allege that he has been intentionally discriminated against or unfairly treated. Since the factual situation in this case does not come within the realm of the matters that are protected

by the Equal Protection Clause of the Fourteenth Amendment, as a matter of law, Petitioner-Employee failed to sustain its burden of showing that he has a recognizable claim arising under the Equal Protection Clause.

IV. THE ISSUES PRESENTED BY PETITIONER-EMPLOYEE DO NOT MERIT THIS COURT'S REVIEW

The issues raised in Petitioner-Employee's Petition do not merit this Court's review. The Petitioner-Employee approached this Court seeking correction of the Appellate Division's alleged error of its decision. This Court has long held, it "do[es] not grant certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), for its certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 US. 259, 275 (1981) (Stevens, J., concurring) See also, *Ponte v. Real*, 471 U.S. 491, 501-02 (1985) (Stevens, J., concurring) ("The merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound administration of the Court's discretionary docket."). Petitioner-Employee gives absolutely no "compelling reasons," other than personal unhappiness with the outcome of the Appellate Division Decision that would warrant this Court's extraordinary review. Instead, Petitioner-Employee states without any authority that this Court should grant certiorari because it presents an extremely important opportunity for this Court to vindicate the right to jury trial so that rendered jury verdicts are not unlawfully set aside by appellate courts, in violation of due process, equal protection of the laws and the last clause of the Seventh Amendment. However, in this case, the Trial Court correctly reduced

the jury verdict for damages and the Appellate Division correctly affirmed the Trial Court's reduction of damages. These actions taken by the Trial Court and the Appellate Division are unquestionably constitutional and are well-settled principles of law. Thus, this Petition falls far short of either the inter-circuit conflict, See Point V, *infra.*, or important federal questions standards, which are required for this Court's review. Supreme Court Rule 10. Hence, based on the foregoing, this case is a singularly inappropriate vehicle for consideration of the questions presented by the Petition and the Appellate Division Decision should stand.

V. THE DECISION BELOW DOES NOT PRESENT A CONFLICT WITH ANY OTHER DECISION

The Appellate Division's affirmance of the Trial Court's decision ordering a reduction in the amount of damages, a ruling that has been vibrant for almost 300 years, was constitutional in all respects. This rule continues to be applied today. The Appellate Division Decision does not conflict with the decisions of any other state's highest court, with the decision of any federal court of appeals, or with any decision of this Court. Moreover, Petitioner-Employee does not even allege that the Appellate Division Decision conflicts below with any other decision. Thus, Petitioner-Employee is trying to urge this Court to abandon the common law accepted by this nation, and indeed by the entire Anglo-Saxon justice system, with respect to a court's inherent right to reduce a jury's award of damages. Based on the foregoing, under law that has been consistently applied by state and federal courts for almost 300 years, this Court should deny Petitioner-Employee's Petition for a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, Respondents Lawrence-Properties, Inc., Lawrence-Picaso, Inc., d/b/a Lawrence Properties and Lawrence Properties respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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Index No. 603935/99

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MARK WIENER,
Plaintiff,

-against-

LAWRENCE-PICASO, INC., LAWRENCE PICASO, INC., d/b/a LAWRENCE PROPERTIES and LAWRENCE PROPERTIES,
Defendants

(Assigned to IAS, Part 44, Justice Norman C. Ryp)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the plaintiff MARK WIENER hereby appeals to the Appellate Division, First Department, of the Supreme Court of the State of New York, from an Order and Judgment issued by Justice Norman C. Ryp, entered in the above—entitled action in the office of the Clerk of the County of New York on February 5, 2002, to the extent that such Order and Judgment: (1) reduced the jury's verdict in favor of plaintiff and against defendants, from $205,000.00 to $34,266.67; (ii) failed to enter judgment in the amount of such $205,000 verdict; and (iii) failed to award interest from July 29, 1999 to the date of entry of judgment on the amount by which such $205,000.00 sum exceeded $34,266.67, and only from such parts of the aforesaid Order and Judgment and from no other part.

Dated: New York, New York February 5, 2002

Yours, etc.,

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Supreme Court, U.S.
FILED
JUN 3 = 2003
OFFICE OF THE CLERK

(3)

No. 02-1364

IN THE

Supreme Court of the United States

MARK WIENER,

Petitioner,

v.

LAWRENCE-PICASO, INC.,
LAWRENCE PICASO, INC. d/b/a
LAWRENCE PROPERTIES and
LAWRENCE PROPERTIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT, STATE OF NEW YORK

REPLY BRIEF

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PRELIMINARY STATEMENT

The Opposing Brief as shown below amazingly and most flagrantly falsifies on crucial matters in this case (Reply Points I-IV, *infra*). This proceeding presents an unusual and excellent opportunity for the Court to vindicate the rights to due process, equal protection and jury trial which were so massively violated here by the New York appellate courts.

REPLY POINT I

IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION AND PETITIONER'S RIGHT TO JURY TRIAL, THE NEW YORK APPELLATE DIVISION UNLAWFULLY OVERTURNED THE JURY'S VERDICT ON LIABILITY WHICH HAD NEVER BEEN APPEALED.

The Opposing Brief outrageously misrepresents when it states "the Appellate Division never directed a verdict" against petitioner on liability and that "the Appellate Division respected the jury's finding of liability" (Opposing Brief, p. 18).

When the case was tried before the jury virtually the sole issue was alleged wilful nonperformance or malfeasance (Petition, p. 4, not disputed in Opposing Brief).

This was the liability issue, as correctly charged by the trial judge (PA361-PA362).[1] If there was wilful nonperformance or malfeasance, plaintiff would recover nothing (PA359 and PA361).

The jury verdict was that neither of these was present and, accordingly, respondents had breached the contract when they fired petitioner (Petition, p. 10a).

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1. "PA" refers to Petitioner's Appendix filed with the Appellate Division of the New York State Supreme Court.

The New York Appellate Division Opinion on its very face directs a verdict against petitioner on these issues (Petition, pp. 2a-3a). Nothing could be more plain. It overturned the jury verdict on liability, even though liability had never been appealed by the respondents.

Once respondents' liability was found by the jury, the computation of damages was a matter of simple multiplication, at the uncontested rate of $50,000 per year. The unchallenged testimony by the unrefuted expert witness before the jury was that the contract would have run for a minimum of ten years (PA220). The jury awarded 4.5 years of damages, comprised of one year from the initial 3 year term, and 3.5 years beyond the initial 3 year term, all of which was not challenged before the Appellate Division or in this Court. It was a very conservative calculation.

The only battle in this case has been on liability, to wit, whether there was wilful nonperformance or malfeasance.

Respondents' Second Question Presented (Opposing Brief, p. i) rolls out respondents' alleged evidence on the liability question of malfeasance or wilful nonperformance. All of that alleged evidence was heard by the jury during the eight day trial when it decided liability in this case, in favor of petitioner. The jury's finding that respondents were liable was confirmed by the trial judge who fully agreed and liability was never appealed by the respondents, which is undisputed (Petition, p. 5).

The Appellate Division broke the law and violated petitioner's constitutional rights when it chose to overturn the jury verdict on liability even though it had not been appealed and without notice to petitioner and in utter violation of established rules of the common law requiring that a jury verdict based solely on credibility of witnesses be fully respected. (Petition, pp. 6-7).

REPLY POINT II

SECTION 5501(c) OF THE NEW YORK CPLR AND THE DOCTRINE OF REMITTITUR, ARE BOTH COMPLETELY IRRELEVANT. ACCORDINGLY THEY DO NOT OVERCOME THE EGREGIOUS VIOLATION HERE OF PETITIONER'S CONSTITUTIONAL RIGHTS.

At pages 11-18 of the Opposing Brief, respondents rely heavily upon the doctrine of remittitur and New York CPLR 5501(c), as if they were relevant and could sanitize these violations of the constitutional right to jury trial, due process and equal protection.

Remittitur and New York CPLR 5501(c) are totally irrelevant in this case. This is not a case about alleged excessive damages, such as in a tort pain and suffering situation. The computation of damages here was extremely simple, very conservative and not contested (Reply Point I, *supra*).

The issue here is and was solely liability, whether there was malfeasance or wilful nonperformance. Witness the fact that the Opposing Brief goes on and on about alleged evidence on those questions alone and at no point disputes the calculation of damages by the jury (e.g., Opposing Brief, Second Question Presented, pp. i-ii and Opposing Brief, pp. 2-6).

Remittitur involves the ordering of a new trial unless the plaintiff agrees to a reduction of the verdict. This is conceded in the Opposing Brief at page 15:

> "ordering a new trial . . . conditioned on the verdict winner's refusal to agree to a reduction (remittitur) [citation omitted]."

Under New York law, where there is additur or remittitur:

> "The trial court does not merely substitute the figure it deems the minimum or maximum. It merely grants a motion for new trial, made by the aggrieved party on the ground of the inadequacy or excessiveness of the verdict, 'unless' the defendant agrees to pay a higher sum (additur) or the plaintiffs agree to accept a lower sum (remittitur) than the verdict." [D. Siegel, ***Practice Commentaries, C5501:8***, reprinted in ***7B McKinneys Consolidated Laws of New York Annotated***, pp. 22-23 (1995).]

CPLR 5501(c) is simply another form of additur or remittitur. Thus, in pertinent part it applies only to a case:

> "in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award. . . ."

That is the essence of remittitur, i.e. a new trial unless plaintiff consents to a lowered award.

All of that is irrelevant here. There was no new trial. The New York courts eviscerated the right to jury trial and violated due process and equal protection by overturning the jury verdict on liability and using that to reduce the damages in this breach of contract case by over 83% (from $205,000 to $34,266.67), a totally unprecedented and unlawful result (see Petition, subheading C, pp. 6-7).

REPLY POINT III

RESPONDENTS' FIRST QUESTION PRESENTED IS FALSE SINCE THE TERM OF THIS CONTRACT INCLUDES THE PERIOD OF AUTOMATIC RENEWAL.

The first Question Presented in the Opposing Brief totally misleads. This contract unquestionably provides for automatic renewal (Petition, pp. 3 and 25a).

Thus, the "unexpired term" of this contract is not merely the "initial term" (the latter being Respondents' own phrase, e.g. Opposing Brief, p. 19), but the entire "unexpired term" provided by the contract, namely the initial term and the period of automatic renewal, conservatively estimated by the jury at 3.5 years after the initial term expired (Reply Point I, *supra*).

Neither the Appellate Division nor the respondents' have questioned the enforceability of the automatic renewal clause in accord with its terms. Automatic renewal clauses are enforced by the courts as written [e.g. *L. Orlik Ltd.* v. *Helme Products Inc.*, 427 F. Supp. 771 (S.D.N.Y. 1977); *Schenkers Int'l Forwarders Inc.* v. *Meyer*, 164 A.D.2d 541, 564 N.Y.S.2d 323 (1st Dept. 1991) and ***22A N.Y. Jur.2d, Contracts § 455***, pages 143-144].

Thus, the "unexpired term" of the contract here is, at a minimum, the balance of the "initial term" plus the unchallenged 3.5 years of automatic renewal as conservatively estimated by the jury.

Given the absence of malfeasance or wilful nonperformance found by the jury, the only ground for respondents to terminate the contract would be the loss of the Ackerman Properties which did not occur (Petition, p. 3). The sole testimony was that the properties would remain with respondents for 10 to 20 years (PA220).

Petitioner was cheated out of a recovery for the "unexpired term" of the contract when the Appellate Division broke the law and overturned a jury verdict which had been based on credibility of witnesses.

REPLY POINT IV

REPLY TO OTHER ITEMS IN OPPOSING BRIEF.

1. Respondent falsifies when it outrageously claims there was ever any admission by petitioner of forgery or any other wrongdoing. The evidence on this matter was fully set forth in the Petition (Opposing Brief, p. 2 and Petition, pp. 7-9). This liability issue, as well as the related liability claims by respondents (insufficient building visits, etc.) were hotly contested at the trial, with "conflicting evidence . . . , with the issue being the credibility of each side's witnesses" (Trial Judge as quoted in Petition, p. 5). Obviously, there was no admission on this or anything else.

2. The Opposing Brief falsely states that the Trial Judge found wilful nonperformance or malfeasance (Opposing Brief, p. 16). The truth is the opposite. The Trial Judge upheld the jury verdict finding the total absence of both (Petition, p. 5).

3. Under paragraph 6 of the Employment Contract it was specifically required that petitioner receive three months' written notice of any alleged defects in his performance. In violation of such requirement this notice was never given (PA153, RA637,[2] RA 688-689 and PA428 included in Petition at p. 25a). The lack of the required notice to petitioner while he was employed was raised at the trial and before the New York State appellate courts (e.g., RA637, PA122, PA153 and PA333; Petitioner's Brief to the Appellate Division, pp. 10-11 and Motion to the New York Court of Appeals, p. 16).

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2. "RA" refers to Respondents' Appendix filed with the Appellate Division of the New York State Supreme Court.

4. The severe constitutional violations raised by this Petition were properly presented to the New York State Appellate Division and the New York State Court of Appeals (Petition, pp. 12-15).

REPLY POINT V

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE UNLAWFUL ABROGATION OF THE JURY VERDICT RENDERED IN HIS BEHALF.

The Opposing Brief argues in flagrant error that petitioner's cause of action, and the jury verdict rendered thereon, are not entitled to due process (Opposing Brief, p. 19).

Petitioner's right to due process in connection with that jury verdict is part and parcel of the due process protections for petitioner's cause of action.

There can be no due process for a cause of action if the verdict rendered thereon can be illegally abrogated, as occurred in this case.

CONCLUSION

The Supreme Court must grant certiorari. This case presents an extremely important opportunity for this Court to vindicate the right to jury trial in this country so that rendered jury verdicts are not abusively and unlawfully set aside by state appellate courts, in violation of due process, equal protection of the laws and the last cause of the Seventh Amendment.

Every United States citizen's right to trial by jury is in severe jeopardy if the travesty of justice exhibited in this case is not remedied by the United States Supreme Court.

Respectfully submitted,

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